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## United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
 AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <https://commerce.senate.gov>

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August 14, 2023

The Honorable Jessica Rosenworcel  
 Chairwoman  
 Federal Communications Commission  
 45 L Street, N.E.  
 Washington, DC 20554

Dear Chairwoman Rosenworcel,

We write to express our concern regarding the Federal Communications Commission's (FCC or the Commission) failure to grant approximately 90% of licenses won in the 2496-2690 MHz ("2.5 GHz") auction. The decision to withhold licenses from T-Mobile—the sole 2.5 GHz auction winner to have its licenses withheld—after the company paid the FCC more than \$300 million over ten months ago, appears to be inconsistent with licensing provisions of the Communications Act of 1934 (Communications Act) as well as Commission precedent. Furthermore, continued delay deprives millions of Americans in rural areas connections to higher speed 5G Internet. The Commission has multiple sources of legal authority it can rely on to provide access to this spectrum and should do so promptly.

While you claim to be unsure of the FCC's authority to grant these licenses due to the lapse of FCC spectrum auction authority, legal experts have held that the FCC retains power to grant licenses irrespective of whether it has authority to auction spectrum.<sup>1</sup> As a bipartisan group of former FCC general counsels has written, the Commission never lost its authority to grant 2.5 GHz licenses pursuant to section 309(a) of the Communications Act despite the current lapse in auction authority.<sup>2</sup> In other words, when Congress enacted the FCC's spectrum auction authority

<sup>1</sup> See 47 U.S.C. § 307(a) ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter"); 47 U.S.C. § 309(a) ("Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application").

<sup>2</sup> See Letter from Samuel L. Feder, Partner, Jenner & Block LLP, *et al.*, to P. Michele Ellison, General Counsel, FCC (Mar. 23, 2023), <https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp?applType=search&fileKey=1494061690&attachmentKey=21729339&attachmentInd=applAttach>; see also Letter from Kathleen Ham, Senior Vice President, Government Affairs, T-Mobile USA, Inc. to Michele Ellison, General Counsel, FCC, ULS File Nos. 0010206629 and 0010475575 (July 5, 2023), [https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp;ATTACHMENTS=jfsxu9KUK\\_P0zKa26L3](https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp;ATTACHMENTS=jfsxu9KUK_P0zKa26L3)

in section 309(j) of the Communications Act, it authorized the FCC to conduct auctions as a means to resolve mutual exclusivity among spectrum license applicants. However, this authority did not necessarily displace the FCC’s preexisting power to issue licenses *after* mutual exclusivity concerns had been resolved. Such a reading of the law is supported by the Commission’s own practices: following review of an auction winner’s “long-form application” (where the applicant must prove that it is qualified to be issued the licenses it won), the Commission has historically granted licenses pursuant to its authority to grant licenses under section 309(a) rather than its authority to conduct spectrum auctions under 309(j).<sup>3</sup> T-Mobile has already won its bids in the 2.5 GHz auction, paid for the licenses it won, and submitted its long form application. There appears to be no reason why the FCC should not be able to similarly use its 309(a) authority to issue the licenses here.

Even if the Commission harbors doubt about its authority to grant the pending licenses until its authority under Section 309(j) is restored, there should be no question that the FCC can provide access to 2.5 GHz spectrum under “special temporary authority.”<sup>4</sup> The FCC’s ability to issue temporary authorizations is independent of and predates its authority to act under section 309(j). Moreover, the Commission has routinely granted special temporary authority for other bands after auction authority expired.<sup>5</sup>

By withholding these licenses, the Commission is forcing the spectrum to unnecessarily lie fallow and depriving communities across the country, particularly in rural areas, of better mobile service. According to T-Mobile, putting the 2.5 GHz spectrum to use would bring high-speed broadband to over 900,000 unserved locations.<sup>6</sup> In our home states, allowing this spectrum to come online will have an immediate, positive impact on our constituents: more than 3.5 million customers in 242 of the 254 Texas counties and 57 of 66 South Dakota counties stand to benefit from immediate upgraded connectivity. This will in turn pay dividends for economic growth: at least one study shows that allowing T-Mobile to use the spectrum it won via auction

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<sup>3</sup> See, e.g., Wireless Telecommunications Bureau Grants Auction 108 Licenses, Public Notice, DA 23-155, at 1 (rel. Mar. 1, 2023) (“We grant these licenses pursuant to section 309(a) of the Communications Act, 47 U.S.C. § 309(a)[.]”); Wireless Telecommunications Bureau Grants Auction 107 Licenses, Public Notice, 36 FCC Rcd 10972, 10972 (2021); Wireless Telecommunications Bureau Grants Auction 105 Priority Access Licenses, Public Notice, 36 FCC Rcd 4926, 4926 (2021); Wireless Telecommunications Bureau Grants AWS-3 Licenses in the 1755-1780 MHz and 2155-2180 MHz Bands, Public Notice, 30 FCC Rcd 11347, 11348 (2015); Wireless Telecommunications Bureau Grants Advanced Wireless Services Licenses, Public Notice, 21 FCC Rcd 13883, 13884 (2006).

<sup>4</sup> 37 U.S.C. §§ 309(c)(2)(C) (relating to “special or temporary authorization to permit interim operation ... to provide substantially the same service as would be authorized by such”) and 309(f) (“if [the Commission] finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, [the Commission may] grant a temporary authorization, accompanied by a statement of its reasons therefor”).

<sup>5</sup> See, e.g., Application for Special Temporary Authority of Smith Radio, LLC, ULS File No. 0010471607 (filed Mar. 23, 2023); Application for Special Temporary Authority of Rocha Controls, ULS File No. 0010505957 (filed Apr. 18, 2023); Application for Special Temporary Authority of NE Colorado Cellular, Inc., ULS File No. 0010526860 (filed May 2, 2023).

<sup>6</sup> Further Supplement of T-Mobile USA, Inc., Request for Special Temporary Authority, File No. 0010475575 (filed June 21, 2023).

would generate tens of billions of dollars in economic activity.<sup>7</sup> In addition to these opportunity costs from inaction, it has been estimated that over 6,500 wireless industry jobs and approximately 17,000 jobs in the general economy will be put on hold until the 2.5 GHz licenses are issued.<sup>8</sup>

Taking no action on the now-vacant 2.5 GHz spectrum, denying Americans access to enhanced connectivity, and allowing other countries to achieve better 5G deployment is unacceptable. Worse, the FCC appears to be holding onto T-Mobile's \$304 million payment while providing nothing in return. If it had been a private company that accepted payment and then refused delivery of goods or services, a customer would be well within its rights to sue for breach of contract. This circumstance is similar, but it is perhaps even more egregiously unfair given the power dynamics: a government regulator is withholding a legitimately obtained good from a regulated entity.

The Commission should do what it can to ensure that this valuable mid-band spectrum is put to use as quickly as possible. If you do not act promptly to issue these licenses, we request a full accounting for your failure to do so by responding in writing to the following requests for information by no later than August 28, 2023. In your response, please identify the question to which each section of your response relates.

1. Please list each source of the authority given to the Commission to grant a spectrum license, including every statutory source the Commission has explicitly relied on in the past twenty years to grant licenses won at auction.
2. For each source of authority listed in response to question 1 (other than the Commission's auction authority in section 309(j)), please provide a detailed legal analysis for why the FCC cannot use that authority to issue the licenses in this case.
3. Please detail the legal reasoning for not granting temporary licenses under every source of special temporary authority that the Commission has under the Communications Act (other than any such authority conveyed by section 309(j)).
  - a. Has the FCC used its authority under Section 309(f) of the Communications Act to grant any special temporary authority since March 9, 2023?
  - b. If yes, why couldn't the FCC use that same authority to provide temporary authority to use 2.5 GHz spectrum?

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<sup>7</sup> According to the Brattle Group, deploying the 2.5 GHz spectrum for the licenses that were won at auction but not yet granted would generate economic gains of approximately \$42 billion. *See Economic Impact of Delaying the Deployment of Auction 108 2.5 GHz Licenses*, The Brattle Group, 3 (June 22, 2023), [https://www.brattle.com/wp-content/uploads/2023/07/Economic-Impact-of-Delaying-the-Deployment-of-Auction-108-2.5-GHz-Licenses\\_v3.pdf](https://www.brattle.com/wp-content/uploads/2023/07/Economic-Impact-of-Delaying-the-Deployment-of-Auction-108-2.5-GHz-Licenses_v3.pdf).

<sup>8</sup> *See id.* at 4.

- c. Provide instances, since March 24, 2023, in which it has taken the FCC more than 60 days to respond to a request for special temporary authority to use spectrum allocated to the licensed wireless services.
4. For each license won by T-Mobile in the 2.5 GHz auction, please list (a) each long-form application filed for that license, (b) the date each such application was filed, (c) the name of the entity that filed such application, (d) the date the filing fee associated with such application was paid, and (e) a link to each such application. In addition, please specifically identify any such application for which there is currently another pending, mutually exclusive long-form application.
5. Provide information on where the over \$300 million paid by T-Mobile currently resides.
  - a. If the Commission has no legal basis to issue the licenses T-Mobile won in the auction, what is the federal government's basis of legal authority for keeping over \$300 million from T-Mobile?
  - b. Please explain in detail how the Commission's actions comport with the Fifth Amendment to the United States Constitution.
  - c. Is the federal government collecting interest on this funding? Has the federal government already spent or allocated this funding?
  - d. If the \$300 million paid by T-Mobile is not currently held by the FCC, has the FCC notified the Department of Treasury that the FCC has deposited funds for which it has not fulfilled the FCC's obligation (i.e., to issue licenses)?

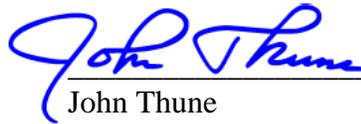
Thank you for your attention to this matter. We look forward to your response.

Sincerely,



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Ted Cruz  
Ranking Member  
Committee on Commerce, Science,  
and Transportation



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John Thune  
Ranking Member  
Subcommittee on Communications, Media,  
and Broadband